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The Place for Prisoners in EU Law?

Leandro Mancano*

Abstract

In recent years, a territorially unbounded power to imprison individuals within the EU has been developing. Such a dynamic has significantly impacted on EU citizenship law, which in turn has been strengthened by basing on residence the conferral of many rights. In this paper, I investigate what role prison and prisoners can have in EU law, with specific regard to EU citizenship. In order to answer such a question two scenarios are outlined, which embody the ways in which detention and Union citizenship have intertwined hitherto. Firstly are intersections between EU-grounded detention and EU citizenship. This group includes actual connections (as is the case of *Wolzenburg*, *Kosłowski*, *Lopes Da Silva* and *I. B.* CJEU's decisions), as well as interplays which have not concretised yet (as shown by the Framework Decisions on transfer of prisoners and on probation measures). On the other, the mutual influence between state-grounded detention and EU citizenship. Recent CJEU cases such as *Onuekwere* and *M. G.* demonstrate that detention is capable of significantly affecting the rights provided for by EU citizenship. By reading these two scenarios through the conceptual couple integration/reintegration, I show strengths and weaknesses of the conditions of prisoners as EU citizens.

Research question and plan of the article

What role can prison and prisoners have in EU law? I shall clarify the context, scope and structure of my research. Firstly and foremost, I focus on criminal law detention. Though I acknowledge that administrative detention (such as immigration detention) is highly relevant to EU citizenship, I pay attention only to that kind of deprivation arising from criminal proceedings. Secondly, by the terms *power to imprison/detain/deprive of liberty*, I refer to: the choice to resort to detention made by the (EU or national) legislatures; the enforcement of a detention order or of a custodial sentence, especially in the context of judicial cooperation within the EU. Thirdly, I link my analysis to EU citizenship. This status rests on the right to move and reside freely across the EU without being discriminated on grounds of nationality. Needless to say, this has huge consequences on the importance of the nationality link, from the viewpoint of both states and individuals. On the one hand, every EU citizen can 'hang the hat' in a Member State other than that of nationality, and acquire a set of rights which blurs the boundaries between citizens and non-citizens of that Member State. On the other hand, EU citizenship brings with it the obligation, for the states concerned, to recognise those rights, without favoring their own nationals in the absence of a lawful justification.

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Against that background, I am interested in understanding the effects that the status of EU citizenship can have on persons in detention. To this end, an exhaustive response requires the analysis of two complementary scenarios. The first scenario focuses on the possibility for the detainee to execute a custodial sentence or a detention order where s/he has the higher level of connection. This thread is mostly shaped by interactions between EU criminal law and EU citizenship. One can distinguish: actual interactions, represented by the *Kozłowski*, *Wolzenburg*, *Lopes Da Silva* and *I. B.* decisions of the Court of Justice of the European Union ('the CJEU' or the 'Court'); and interactions which have not yet taken place, such as those involving the Framework Decisions (FDs) on the Transfer of Prisoners and on Probation Measures.

The second scenario deals with the question as to whether, to what extent and with what consequences, the commission of a criminal offence breaks the link which ties the wrongdoer to the state where s/he has moved to. In this scenario national criminal law meets EU citizenship, resulting in a CJEU case-law (*Tsakouridis*, *P. I.*, *Onuekwere* and *M. G.*) concerned with the impact of custodial sentences on EU citizenship rights. The two scenarios are strictly intertwined. In these respect, I submit that it is key reading them in light of the conceptual couple *integration/reintegration*. As I explain, giving the chance to serve a custodial sentence or a detention order in the host Member State is based on reintegration purposes. On the other hand, being granted that chance comes with an assessment of the degree of the integration of the person concerned in that state. However, one cannot ignore that imprisonment can heavily impact on that integration assessment. This affects in turn the possibility to spend prison time in a given state, and also more generally the achievement of EU citizenship rights. Therefore, one can see that the relationship between the two scenarios is a circular one. Likewise, answering my research question helps understanding not only of the impact of EU citizenship law on detention, but also the condition of detainees in EU citizenship (*as EU citizens*).

This article is structured into four parts. Firstly, I contextualize the power to detain at EU level, by making reference to the evolution occurred in this respect over recent decades. In this part I show the growing interaction between detention and EU citizenship, with particular regard to the application of the principle of mutual recognition of judicial cooperation in criminal matters. Secondly, I focus on EU citizenship law: Treaty provisions and Directive 2004/38/EC (or 'the Citizenship Directive')¹. I hereby explain why integration and reintegration are key to answering my research question. Furthermore I underline how they, and the broader system of EU citizenship, have a centerpiece in the concept of residence. Thirdly, I analyse the two scenarios against the conceptual yardstick of integration and reintegration. As to the first scenario (interaction between EU criminal and EU citizenship), I place my analysis in the broader context of the principle of mutual recognition in EU criminal law. By paying special attention to the case of the European Arrest Warrant (EAW) FD, I show how that principle has significantly diminished the importance of nationality to detention and criminal law at EU level. Then I examine the actual and potential interactions, by highlighting strengths and weaknesses of the relevant EU law from the perspective of detainees' rights. I precede the discussion of the second scenario

¹ Directive 2004/38/CE of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77, 30 April 2004.

(national criminal law interplaying with EU citizenship) with the outline of the background of the recent development in the Court's approach to integration and EU citizenship. Then I move on to the judgments relevant to the specific topic of this paper. In the last part I take the stock of the overall analysis carried out. I conclude that the salience of nationality has significantly decreased when it comes to detainees and EU citizenship. This is especially the case of the reintegration of the person concerned. Furthermore, I maintain there is an ongoing involution of the Court's case-law, with regard to the relationship between imprisonment and integration of the detainee in the host Member States.

1. The power to detain at EU level

Citizenship and the state's decision to detain an individual share a number of important features. Firstly, they historically represent two strongholds of national identity. Though different and interdisciplinary perspectives may be adopted to deal with citizenship, the legal approach usually looks upon it as a combination of two elements². On the one hand citizenship as a status, linking the state to its citizens. On the other, citizenship as bearer of a complex of rights enjoyed by citizens³. Likewise, detaining individuals is inextricably linked to a cultural and societal context which takes a legal shape through the channel of sovereignty⁴. Deprivation of liberty perhaps represents the most 'classical' expression of state sovereignty over the individual, which in turn reveals its very nature in the use of the monopoly of force. As Max Weber put it⁵, a state is a community that successfully claims the monopoly of the legitimate use of physical force, the sole source of the 'right' to use violence. Since the Enlightenment reform, the role of national parliaments is key to the decision to deprive individuals of their liberty. As an expression of popular sovereignty, they mirror the social sensitiveness of a nation in a given historical moment. This aspect is particularly important when dealing with criminal law, the area which par excellence is seen as embodying the outcome of states' cultural development. The arguments backing such viewpoint are perfectly epitomised by the 2009 *Lisbon judgment* issued by the German Constitutional Court⁶.

² D. Kochenov, *Ius Tractum of Many Faces: European Citizenship And The Difficult Relationship Between Status And Rights*, in *The Columbia Journal of European Law* (CJEL), V 15/no 2, p. 175-176.

³ However Kochenov, *op. cit.*, found that the relationship between status and rights may be flexible, and another distinction is possible to be drawn between " 'formal' citizenship, resting on the status, and 'informal' citizenship, emphasising the importance of the possibility of enjoying citizenship rights as opposed to the importance of possessing the formal legal status of a citizen".

⁴ As to the relationship between personal liberty and sovereignty, a fundamental contribution is represented by G. Amato, *Individuo e autorità nella disciplina della libertà personale*, Milano: Giuffrè, 1967.

⁵ M. Weber, *Politics as a vocation*, Munich, 1919.

⁶ Judgment of 30 June 2009 - 2 BvR 1010/2008, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 5/08 e 2 BvR 182/09, available at www.bverfg.de/entscheidungen/es20090630. An analysis from this perspective, see M. Böse, *La sentenza della Corte costituzionale tedesca sul Trattato di Lisbona e il suo significato per la europeizzazione del diritto penale*, in *Criminalia*, 2009, pp. 267-301.

A second aspect which is shared by citizenship and deprivation of liberty is that they found a first manifestation at EU level with the 1992 Maastricht Treaty, although incipient forms of such a framework had previously taken place⁷. Thirdly, and in connection to the second point, citizenship and decision on detention have been undergoing a groundbreaking change over the last decades⁸. The EU Treaty reforms, flanked by a conspicuous case-law of the Court of Justice, have resulted in unprecedented interactions between EU citizenship and detention (and criminal law more in general).

Therefore, the close connection between deprivation of liberty and state power is to be reconsidered. Such an evolution has been mainly triggered by the use of the principle of mutual recognition in judicial cooperation in criminal matters within the EU, adopted since the European Council of Tampere in 1998⁹. As known, the application of mutual recognition in criminal matters is a principle borrowed from the internal market law¹⁰. Introduced by the CJEU with the *Cassis de Dijon* judgment¹¹, it requires that a product/economic activity that has been lawfully produced/marketed/exercised in one Member State, should be capable of being marketed into another Member State without further burdens or conditions. Such a principle finds a limit in the Treaty exceptions (e.g. public policy or public health) and the mandatory requirements/justifications as elaborated by the Court of Justice (the so called ‘rule of reason’)¹². Thereby, mutual recognition is mostly a sort of negative

⁷ As for pre-Maastricht citizenship, see in particular D. Kochenov and Sir R. Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in 37 Eur. L. Rev. 369 (2012), pp. 369-396. Member States started cooperating in the fields of criminal justice and law enforcement a long time before the adoption of the Maastricht Treaty. Such cooperation, mainly directed towards terrorism and drug trafficking, took place at a threefold level: United Nations (UN), Council of Europe (CoE). See M. Jachtenfuchs, J. Friedrichs, E. Herschinger, C. Kraft-Kasack, *Policing Among Nations. Internationalizing the Monopoly of Force*, Hertie School of Governance - working papers, No. 28, April 2008, pp. 8 onwards. See for instance the 1957 Convention on extradition (ETS 24), the 1959 Convention on mutual assistance (ETS 30) and the 1983 Convention on the transfer of prisoners (ETS 112). On these aspects, and for further bibliography, see S. Peers, *Mutual recognition and Criminal Law in the European Union: Has the Council got it Wrong?*, in *Common Market Law Review*, 41, 2004, pp. 6 onwards.

⁸ See among many D. Kochenov, *EU Citizenship Without Duties*, in *European Law Journal*, Volume 20, Issue 4, pp. 482-498, July 2014; M. Delmas-Marty, *The European Union and Penal Law*, in *European Law Journal*, Vol. 4, Issue 1, pp. 87-115; A. Bernardi, *Principi di diritto e diritto penale europeo*, in *Ann. Univ. Ferrara - Sc. Giur. Nuova Serie*, Vol. 11 (1988), pp. 77-213, available at <http://giuri.unife.it/it/ricerca-1/allegati/annali/volume1988.pdf>

⁹ Tampere European Council, 15 and 16 october 1999, Presidency Conclusions.

¹⁰ C. Janssen, *The Principle of Mutual Recognition in the EU Law*, Oxford: Oxford University Press, 2013; J. Snell, *The internal market and the philosophies of market integration*, in C. Barnard and S. Peers (ed), *European Union Law*, Oxford: Oxford University Press, 2014, pp. 300-323.

¹¹ Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, [1979] ECR 00649.

¹² See A. Rosas, *Life after Dassonville and Cassis: Evolution but No Revolution*, in M. Poiares Maduro and L. Azoulai (ed), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford: Hart Publishing, 2010, pp. 433-446; C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, Oxford: Oxford University Press, pp. 171-177, pp. 496 onwards; Ö. İnancılır, *Derogation from the Free Movement of Goods in the EU: Article 30 and 'Cassis' Mandatory Requirements Doctrine*, in *Ankara Bar Review*, 2008/2, pp. 106-113.

integration, which facilitates the enjoyment of Treaty rights by the free movements of products and persons under a de-regulatory logic.

The application of this logic to criminal law has caused a heated debate¹³. Indeed, in criminal matters each instrument of mutual recognition concerns one or more kinds of judicial decisions (arrest warrant, custodial sentence, probation measure) and abolishes the requirement of double criminality for a list of 32 offences. According to such a requirement, the conduct at the basis of the judicial act at stake must constitute an offence in the jurisdictions of both the requesting and the requested states. Once that requirement has been removed, the balance in cooperation substantially changes. Indeed, when one of these judicial decisions is issued for one of the 32 conducts by the Member State A (the issuing Member State) to the Member State B (the executing Member State), the latter has to recognise and execute the decision automatically and without any further formality. For those offences not included in the mentioned list, the double criminality principle remains. However, though the executing Member State does not treat that conduct as a crime in its own legal order, it may surrender the person concerned all the same, once the issuing Member State has required it. The automaticity of mutual recognition in criminal matters is mitigated by mandatory and optional grounds for refusing the execution, as well as by specific rules leaving some discretion to the executing judge. Strictly connected to this application of mutual recognition is the legal approximation in substantive and procedural criminal matters, carried out through EU competences provided for in the Treaty¹⁴. For the purposes of the present discussion, Article 83(1) TFEU is worth mentioning, under which the Union can adopt criminal law directives in a number of areas of particularly serious criminality which have a cross-border dimension.

¹³ Among countless publications on the topic, see V. Mitsilegas, *The constitutional implications of mutual recognition in criminal matters in the EU*, in *Common Market Law Review* (43) 2006, pp. 1277-1311; S. Peers, *Mutual recognition and criminal law in the European Union: has the Council got it wrong?*, in *Common Market Law Review* (41) 2004, 5-36; S. Lavenex, *Mutual recognition and the monopoly of force: limits of the single market analogy*, in *Journal of European Public Policy*, 14:5 August 2007, pp. ; for a state-by-state overview of the application of mutual recognition across EU area, see G. Vernimmen-Van Tiggelen, L. Surano, A. Weyembergh, *The future of mutual recognition in criminal matters in the European Union*, Bruxelles, Editions de l'université de Bruxelles, 2009; C. Jannsen, *The Principle of Mutual Recognition*, *op. cit.*; on mutual recognition and extraterritoriality, see Nicolaidis and Shaffer, *Transnational Mutual Recognition Regimes: Governance without global government*, in 68 *Law and Contemporary Problems* (2005), p. 267

¹⁴ Among the plethora of studies on approximation of EU criminal law, see A. Bernardi, *L'armonizzazione delle sanzioni in Europa: linee ricostruttive*, in G. Grasso, R. Sicurella (ed), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milano: Giuffrè, 2008, pp. 76-132; A. Klip, *European Criminal Law*, *op. cit.*, p. 32; A. Weyembergh, *L'harmonisation des législations pénales: condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles: Editions de l'Université de Bruxelles, 2004, pp. 31-36. A. Weyembergh, *The function of approximation of penal legislation within the European Union*, in 12 *Maastricht Journal of European and Comparative Law* 2 (2005), pp. 149-172. A. Weyembergh, *Approximation of criminal laws, the Constitutional Treaty and the Hague Programme*, in *Common Market Law Review*, (42) 2005, pp. 1574 onwards. A similar stand is taken by A. Bernardi, *Politiche di armonizzazione e sistema sanzionatorio penale*, in T. Rafaraci (ed), *L'area di libertà sicurezza e giustizia: alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Milano: Giuffrè, 2007, pp. 199 onwards. *I tre volti del diritto penale comunitario*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 1999, pp. 333 onwards.

Having outlined the broader context in which the power to detain has been developing at EU level, now I move on to EU citizenship law, by paying special attention to the concept of residence. Then, I hone in on *integration* and *reintegration*, by highlighting why: they are inextricably related to residence; they are decisive to the analysis of the two scenarios considered.

2. Residence, integration and reintegration

I contend that the conceptual couple *integration/reintegration* is key to understanding the role of nationality links in the EU approach to detention. Before going into the detailed analysis, I have to elaborate on the key features which lie behind these concepts: namely, *the meaning of* and *the right to* residence of EU citizens in the host Member State¹⁵. By right to residence, I mean the right to permanent residence in the host Member State. It is important to draw a distinction between the concept of legal residence and the right to residence. They are inextricably linked, but the former is a logic *prior* to the latter. The having spent a given timeframe of legal residence in a host Member State allows the achievement of right to residence and many other rights. Furthermore, it outlines the scope of application of important provisions of EU law. This may hold true for those EU criminal law instruments discussed in this article, namely the EAW¹⁶, the transfer of prisoners and the probation measures FDs¹⁷. Residence is also essential to EU citizenship, and in particular the Citizenship Directive. As Kochenov argues, only a limited number of rights is uniquely associated with the status of citizenship as such. One of these is residence security, namely the unconditional right to enter and stay in the territory of a polity. ‘Residence security is at the core of what the essential legal essence of the citizenship status is now about’, which also explains why (even the mere possibility of) being deported and expelled ‘play(s) an essential role in outlining with clarity the scope of those who are citizens of a polity, as opposed to merely residents’¹⁸.

¹⁵ G. Davies ‘Any Place I Hang My Hat?’ or: *Residence is the New Nationality*, in *European Law Journal*, Vol. 11, No. 1, January 2005, pp. 43–56.

¹⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002.

¹⁷ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20, 11.11.2009; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102, 16.12.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L327/27, 5 December 2008.

¹⁸ D. Kochenov and B. Pirker, *Deporting the Citizens Within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v. Oberbürgermeisterin der Stadt Remscheid*, in (2013) *Columbia Journal of European Law* 19:2, pp. 374 onwards.

Both *the definition of* and *the right to* residence are key to the law of EU citizenship in the following way. In a broad sense, such a status has been defined as granting every Union citizen the entitlement to move and reside freely within the Union regardless of their nationality¹⁹, and without requiring links to the performance of an economic activity²⁰. Furthermore, EU citizenship has been related to the principle of non-discrimination on grounds of nationality²¹. Such a link, established by the Court of Justice, is currently codified in Articles 18, 20 and 21 of the TFEU, under the heading ‘Non-Discrimination and Citizenship’. On the other side, the Treaty provisions are further implemented by Directive 2004/38/EC²², where the rights borne by EU citizenship are outlined, as well as the ways to achieve them. The Directive provides the conditions on which the right to free movement and residence across the EU is granted on the Union’s citizens and their family members, independently of their nationality. The main purpose of the Directive is promoting social cohesion and giving Union citizens chances of integration throughout the EU. To this end, EU citizens and their family members are granted the unconditional right to residence in the host Member State for a period of up to three months. Should the staying be longer, the right is made subject to specific requirement²³. The right to permanent residence, provided for in Article 16, is conferred upon Union citizens after they have legally resided for a continuous period (which is not affected by temporary absences) of five years in the host Member State. Once acquired, the right of permanent residence shall only be lost through absence from the host Member State for a period exceeding two consecutive years.

The central role played by integration and residence also emerges upon analysing another feature of the system built on by the Directive, that is to say the protection against the expulsions. Recital 23 considers such a measure capable of seriously harming persons who have become genuinely integrated into the host Member State; the degree of integration and the length of residence are to be considered, when carrying out the proportionality test on the expulsion decision²⁴.

¹⁹ Case C-224/98, *D’Hoop*, [2002] ECR I-6191, para 28; Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, para 31; Case C-138/02, *Colins*, [2004] ECR I-2703, para 61 onwards.

²⁰ *Grzelczyk*, para 36-37; Case C-413/99, *Baumbast*, [2002] ECR I-7091, para 81. Furthermore, the possibility as to the self-standing status of EU citizenship came particularly to the fore lately, with the ‘family reunification saga’ fueling the debate in this respect (See Case C-34/09, *Ruiz Zambrano* [2011] ECR I-01177; Case C-256/11, *Dereci* [2011] ECR I-11315; Case C-434/09, *McCarthy* [2011] ECR I-03375). However, for the time being EU citizenship rights are relied upon with no regard to the exercise of free movement only when national measures would force individuals to leave EU territory (McCarthy, paras 50-55). For a commentary, see A. Hinarejos, *Citizenship of the EU: clarifying ‘Genuine enjoyment of the substance’ of citizenship rights*, in *Cambridge Law Journal*, Volume 71, Issue 02, July 2012, pp. 279-282.

²¹ See Case C-76/05, *Schwarz* [2007] ECR I-6849, para 89. See also J. Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, EUI Working Papers RSCAS 2010/60, pp. 9 onwards.

²² For a commentary, see E. Guild, S. Peers, J. Tomkin, *The EU Citizenship Directive. A Commentary*, Oxford: Oxford University Press, 2014.

²³ Directive 2004/38/EC, Articles 6(1) and 7(1).

²⁴ Recital 23.

As a general requirement, every restrictive measure shall follow an individual assessment of the conduct as a serious threat to one of the fundamental interests of society²⁵. In particular, it is worth referring to Article 28, which is the main focus of the CJEU rulings hereby discussed. The mentioned provision establishes two residence-based ‘shields’ against the expulsion: according to paragraph 2, those Union citizens (or their family members) who have the right of permanent residence in the host Member State, may be subject to an expulsion measure so long as there are serious grounds of public policy or public security; the same protection is enhanced at paragraph 3(a), which covers Union citizens who have resided in the host Member State for the previous ten years, unless imperative grounds of public security, as defined by Member States, justify the measure²⁶. Therefore, measures adopted under Article 28(3)(a), by virtue of the reference to the *imperative grounds (only) of public security*, are strictly limited to exceptional circumstances. As a result, the Directive gives substance to EU citizenship, by setting the goal of an effective integration of the Union’s citizens in every Member State. Such an aim is mainly pursued through two complementary tools. On the one hand, the right to reside is defended by the guarantee not to be expelled from the host Member State; on the other, protection against expulsion is achieved after the person concerned has spent a determined period of residence therein.

Moving on to the conceptual couple *integration/reintegration*, their relevance is transversal too. As shown, integration is an essential element of EU citizenship. Such a salience is heightened by the fact that function and nature of integration are far from straightforward. This uncertainty is confirmed when looking upon the *ways* in which EU citizenship is interpreted. In particular two issues arise, as far as the present discussion is concerned. Firstly, the extent to which (and with what consequences) prison time may show a lack of integration in the host Member on the part of the person concerned. Secondly, the relationship between integration and the right to residence. Whether the former is understood in relation to the latter as an aim, a requirement or both can make a huge difference.

Also reintegration is relevant for a number of reasons. In particular, it is traditionally considered a fundamental function of criminal sanctions. This proves to be true both at national and international levels, with rehabilitation being recognized by Member States’ constitutions²⁷, as well as by the EU²⁸ and the Council of Europe

²⁵ Article 27(2).

²⁶ Article 28(3)(a).

²⁷ Concerning Germany, see Article 2 of the Law on the execution of sentences of imprisonment (Strafvollzugsgesetz). With regard to Spain and Italy Constitutions, see Article 25(2) and Article 27(3) respectively.

²⁸ European Parliament Resolution on respect for human rights in the European Union (1997) (OJ 1999 C 98, p. 279), where it is stated that custodial sentences must have a corrective and reintegrative function (para 78).

(CoE)²⁹. On the other hand, reintegration is a crucial element of EU mutual recognition instruments on detention. In the EAW FD reintegration founds an optional ground for refusal of execution; on the other hand, it is the inspiring principle which imbues other FDs on the whole.

As I show below, the *fil conducteur* between these two concepts is residence. In the following section I put in relief how they are central features to detention and citizenship at EU level (and not only), both from a legislative and judicial viewpoints.

3. Two scenarios

3.1 Interactions between EU criminal law and EU citizenship

The first scenario regards the interactions between EU criminal law and EU citizenship. In particular I distinguish between actual and potential interactions. The former have taken place in the forms of CJEU's judgments, and focused on the interpretation of the EAW FD. The latter have not yet occurred, and concern in particular the way in which the FDs on transfer of prisoners and on probation measures, on the one hand, and the Citizenship Directive, on the other, may influence each other.

In order to better present the following analysis, I locate the following analysis in the broader context of the surrender of nationals. As known, the EAW (and more in general the application of mutual recognition to criminal matters) have constituted an actual breakthrough in mutual legal assistance between Member States³⁰. The EAW is the first and most prominent instrument of mutual recognition in EU criminal law³¹. The stated purpose of the FD is that of replacing the extradition procedure with a smoother and swifter system of surrender between judicial authorities³². The introduction of the EAW FD has been groundbreaking for a number of reasons (among others, abolishing the principle of dual criminality, allocating the responsibility for the surrender on judicial rather than political authorities). One of the most important changes (and not only for the purposes of this article) is the (almost complete) drop of the prohibition for a state to extradite its own nationals (also referred to as 'nationality exception' or 'nationality ban'). Indeed, the latter can be considered 'a constant

²⁹ See Recommendation No R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules, adopted on 12 February 1987 and replaced by Recommendation Rec(2006)2, adopted on 11 January 2006. See also the Convention of the Council of Europe on the Transfer of Sentenced Persons of 21 March 1983.

³⁰ For an analysis also of the policy context, see N.Keijzer, *The European Arrest Warrant Framework Decision between Past and Future*, in E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers, 2006; V. Mitsilegas, *The Constitutional Implications*, *op. cit.*; S. Peers, *Mutual Recognition and Criminal Law*, *op. cit.*; S. Alegre and M. Leaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study—the European Arrest Warrant*, *European Law Journal*, Vol. 10, No. 2, March 2004, pp. 200–217.

³¹ However, other instances of this kind can also be found outside the judicial cooperation within the EU. See in this respect the Nordic Arrest Warrant. G. Mathisen, *Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond*, in *Nordic Journal of International Law* 79 (2010), pp. 1–33.

³² At the time of the adoption of the EAW FD, the instrument in force was the 1957 CoE Convention on Extradition CETS No.: 024, 18 April 1960.

feature of extradition law in most civil law countries³³, and is often accompanied in international law instruments by the rule *aut dedere aut judicare* (obligation either to extradite or to prosecute)³⁴.

The understanding of the non-extradition of nationals may vary. On the one hand, it is regarded as being based on ‘a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment such prohibition constituted’³⁵. On the other, according to some scholars the nationality exception has inherent guarantees. In particular, the following considerations should be borne in mind: the person has the right not to be withdrawn from his natural judge; the state owes its subject the protection of its law; it is impossible to trust foreign justice systems, especially when the treatment of foreigners is stake; it is disadvantageous to be tried in a foreign language separated from friends, resources and character witnesses³⁶. However the objective of creating an ever closer Union, with mutual trust playing a major role in this respect, made such arguments hardly tenable. Coherently with this picture, the EAW FD did not come out of the blue. Firstly, one should mention Article 66 of the 1990 Convention implementing the Schengen Agreement, which refers to the possibility for Member States to extradite their nationals without extradition formalities (as long as the surrendered has agreed before a court and s/he has been informed on his/her right to the extradition procedure). Secondly, the 1996 EU Convention on Extradition between Member States must be referred to, which was aimed at limiting the possibility of application of the nationality ban. Such a gradual route was significantly stepped up by three main factors, so leading to the passing of the EAW: the adoption of the Rome Statute of the International Criminal Court (ICC), which distinguishes the state-to-state extradition from the surrender to the ICC, with the latter excluding the possibility of a nationality exception. The Tampere Council Meeting in 1998, where mutual recognition was set as the cornerstone of judicial cooperation in criminal matters within the EU; the terroristic attack to the World Trade Center on 9/11/2001, urging the Union to put into effect actual *EU* instruments to fight crime.

As to the foundation of the removal of the nationality exception, it is interesting to note that the Commission, in its EAW FD Proposal, explicitly established a link by the drop of the nationality exception and EU citizenship, with the latter status eroding the importance of nationality links even with regard to the surrender for

³³ M. Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, in *European Law Journal*, Vol. 15, No. 1, January 2009, pp. 79.

³⁴ See, for a recent overview, the 2015 Final Report of the International Law Commission, *The obligation to extradite or prosecute (aut dedere aut judicare)*. On the other had, common law systems usually authorize the extradition of their own nationals.

³⁵ M. Plachta, *Non- extradition of nationals: A never-ending story?*, in 13 *Emory International Law Rev.* (1999), p. 77.

³⁶ S. A. Williams, ‘Nationality, Double Jeopardy, Prescription and the Death Sentence As Bases for Refusing Extradition’, 62 *International Review of Penal Law* (1991) p. 259 at pp. 260-261, citing the findings of a 1878 British Royal Commission chaired by Lord Cockburn. For a helpful reconstruction of the debate on the extradition of nationals, see Z. Deen-Racsmany and R. Blekxtoon, *The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13/3, pp. 317–363, 2005.

detention purposes³⁷. This nonetheless the implementation of the EAW FD at the national level, and the subsequent overcoming of the nationality ban, have known a difficult path³⁸. This can be traced back to two main circumstances. Firstly the heterogeneity, within the EU, of national constitutional ‘attitudes’ to the prohibition of extradition of nationals. In this respect, it is appropriate to highlight the different levels of ‘protection’ present at the time of adoption of the FD: Member States having no constitutional provisions on the subject matter (Belgium, Denmark, France, Greece, Ireland, Luxembourg, Spain and the United Kingdom); Member States explicitly or implicitly allowing for the surrender of nationals under extradition procedures (Malta, Hungary and Sweden); Member States prohibiting the extradition of nationals (Poland and Cyprus); Member States which have constitutional provisions prohibiting the extradition of nationals, but at the same authorise international treaties to limit it (Italy, Netherlands). The picture is tangled up by the fact that often Member States have also a constitutional provision obliging them to comply with duties stemming from EU or international law.

In order to adjust their legal framework to the surrender of their own nationals, some Member States have amended their constitutions (Germany, Portugal and Slovenia), or have carried out para-constitutional law revisions (Finland). Furthermore, more than one Constitutional Court has been faced with the task of reconciling the obligation to abide by EU law with its constitutional nationality ban³⁹. By way of example, the Polish Constitutional Court reached a balance as follows: while annulling the national law implementing the EAW FD, the Court provided its decision with provisional effects, so as to allow the legislator to adopt the necessary amendments to the Constitution and subsequently reintroduce the annulled provision into the Polish legal system. At the same time, the annulled provision temporarily remained in force. On the other hand, the German Constitutional Court declared the incompatibility of the German law implementing the EAW FD with the German Constitution. In particular, the German law had not implemented those optional grounds for refusal provided for in the EAW FD, which would have established a significant domestic factor.

The second circumstance which has endangered the correct implementation of the EAW FD has to do with the FD itself, and in particular the ways in which the Member States have incorporated Articles 4(6) and 5(3). As I show below, a heated debate flourished as to the compatibility of these national rules with EU law. Both of these provisions authorise national judges to refuse the execution of a EAW. According to Article 4(6), ‘if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention

³⁷ However, this view has been strongly criticized. See in this respect F. Impalà, *The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice*, in 1 *Utrecht Law Review* (2005), pp. 56-78. See also the judgment of the Polish Constitutional Court on the EAW FD.

³⁸ For specific analysis on the English and Italian case, see: J. R. Spencer, *Implementing the European Arrest Warrant: A Tale of How Not to Do it*, in *Statute Law Review* 30(3), pp. 184–202; L. Marin, *The European Arrest Warrant in the Italian Republic*, *European Constitutional Law Review* / Volume 4 / Issue 02 / June 2008, pp. 251 - 273.

³⁹ See J. Komárek, *European constitutionalism and the European arrest warrant: In search of the limits of contrapunctual principles*, in *Common Market Law Review* 44: 9–40, 2007; Z. Deen-Racsmany, *The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges*, in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 14/3, pp. 271–306, 2006.

order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'⁴⁰. As one can easily notice, this provision does more than simply recalling the nationality exception. It added the condition of 'residence' or 'staying in' to the nationality link. It is exactly this 'enlargement' which constituted the main ground for strengthening EU citizenship. Under Article 5(3), execution may be refused 'where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State'.

So far, I have explained how the application of mutual recognition to EU criminal law has had the considerable effect of turning the nationality ban into an exception throughout the Member States legal systems. In the following paragraphs, I firstly analyse how the Court has understood the nationality link in relation to the execution of a EAW (actual interactions). In this sense, the rulings have regarded the interpretation of Articles 4(6) and 5(3) EAW FD. I hereby highlight: the initial inconsistency of this case-law, especially when looking at the first two rulings (*Kozłowski* and *Wolzenburg*); the recent improvement in the Court's approach (especially with regard to fundamental rights protection), as shown by the *Lopes Da Silva* and *I. B.* decisions. Thereafter, I present other mutual recognition instruments on detention. The latter, though not yet subject to a reference to the CJEU, are capable of actually affecting the role of nationality, when spending a period in detention is at stake.

3.1.1 Actual interactions

*Kozłowski*⁴¹ and *Wolzenburg*⁴² revolved around the interpretation of Article 4(6) of EAW FD. Such a provision allows the national judge to refuse the execution of a EAW, where 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'. *Kozłowski* regarded a Polish national who was convicted to a custodial sentence in Germany in 2006. In 2007 the Polish authorities issued an EAW against him for another conviction. The core of the reference regarded the function to be attached to Article 4(6) EAW FD and the meaning of the terms 'resident' and 'staying in'. The AG put in relief the relevant function of this rule, that

⁴⁰ For reflections on the principle of non-discrimination on the basis of nationality and the EAW L. Marin, 'A Spectre Is Haunting Europe': *European Citizenship in the Area of Freedom, Security, and Justice. Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant*, in *European Public Law*, Vol. 17, Issue 4, pp. 705-728.

⁴¹ Case C-66/08 *Kozłowski*, [2008] ECR I-6041.

⁴² For comments see E. Herlin-Karnell, *Case comment Wolzenburg C-123/08*, *The Modern Law Review*, 73(5), p. 824; V. Mitsilegas, *The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual*, in *Yearbook of European Law*, Vol. 31, No. 1 (2012), pp. 338 onwards; T. Marguery, *EU citizenship and European Arrest Warrant: The Same Rights for All?*, in *Utrecht Journal of International and European Law*, 2011, Volume 27, Issue 73, Case Note, pp. 84-91; C. Janssen, *The Principle of Mutual Recognition*, *op. cit.*, pp. 207 onwards.

is to say facilitating the reintegration of the convicted person at the end of his sentence. Though not expressly stated in the FD, such a function may be inferred from a number of elements. Generally speaking, both at EU and CoE levels it has been stated that prison sentences are intended to have a corrective and a social rehabilitation function, and that their main objective is the human and social reintegration of the prisoner. In these documents the Member States hold that imprisonment regime should not cause the detainee to feel excluded from the community. This is possible when detention conditions help the person concerned preserve his family life, as well as (re)acquire employment at the end of the sentence. Moreover, the AG highlighted that the reintegration of the person concerned should be a central interest of the Member States in preventing crime, as the prisoner will come back to society once the sentence has been served. The more the rehabilitative function works, the less the likelihood that the person concerned will re-offend.

Drawing the boundaries of the concepts of ‘staying in’ or being ‘a resident of’ is key to correctly interpreting Article 4(6). Firstly, those expressions have to be independently and uniformly defined at EU level. In particular, the concept of residence has been defined in a number of EU measures, but it has to be interpreted in light of the aim of the provision in which it is mentioned. In this case, the national judge should bear in mind the link between the place where a person is serving a prison sentence and the chance to be reintegrated into the society. That being so, the executing judicial authority must examine all the facts relevant to the individual situation of the person concerned. On the one hand, elements are to be considered such as family and social links, use of the language, the availability of a place to live, having a job, and the length of residence in the State, together with the intention of the person concerned to stay there when he is no longer held in custody. On the other, the circumstance that the requested person is being held in custody or that he systematically commits crimes in the executing State does not automatically exclude him from the scope of Article 4(6), provided that he/she: is a citizen of the Union; has not been delivered an expulsion decision adopted in compliance with EU law.

The Court agreed with the AG, as to the reintegrative function of Article 4(6). Concerning the meaning of resident and staying in, the CJEU found that the former covers those situations in which the requested person has established his actual place of residence (intended as the main center of interests) in the executing Member State. On the other side, the same person is ‘staying’ when, following a stable period of presence in that State, he has acquired connections with it which are of a similar degree to those resulting from residence. In order to establish whether this is the case, the national court must take into consideration factors such as the length, nature and conditions of presence and the family and economic connections which that person has with the executing Member State .

A significant involution in the Court’ approach can be seen in *Wolzenburg*. The case regarded a German national who moved from Germany to Netherlands in 2005 with his wife, and who was employed and then began an apprenticeship therein. In 2006, the German authorities issued a EAW against Mr Wolzenburg. The referring court asked for a preliminary ruling related to the compatibility of the Dutch law implementing the EAW FD with the latter EU instrument. The Dutch law distinguished between Dutch and other nationals. As for the first category, the refusal of the execution was automatic. However, should the warrant have involved a non-Dutch national, the domestic judge should have verified whether or not the person concerned was in possession

of a residence permit of indefinite duration, achievable by virtue of Article 16 of the Citizenship Directive (namely after five years of residence therein). Therefore, at stake there was in particular the compatibility of such a distinction: with Article 4(6); the principle of non discrimination. The AG regarded the national law as detrimental to the reintegrative function from a twofold perspective. For nationals of the executing State, since the judge could not consider whether the person concerned had with that state only a formal connection in terms of nationality. For nationals of other Member States, which are staying in or resident of the executing Member State, but have not acquired yet a residence permit of indefinite duration. Such an approach would exclude from the application of Article 4(6) all those individuals who are not yet (formally) resident, but who are ‘staying’ therein, having established familiar social and working links in the executing State. Furthermore, the national law would be contrary to the principle of non discrimination, which requires that comparable situations must not be treated differently unless such treatment is objectively justified and proportionate. Lastly, it would manifestly sit at odds with the structure and objectives of Article 4(6), under which nationals of other Member States are to be treated in the same way as nationals of the executing State .

Unfortunately, the Court regarded such a difference of treatment as falling under the margin of discretion granted to Member States by Article 4(6). The Member State of execution is therefore entitled to pursue the reintegration objective only with those persons who have demonstrated a certain degree of integration in the society of that Member State. This allows the refusal of surrendering a Member State’s nationals, as well as the requirement of a five-year period of residence in that state for other EU citizens. The Court stated that Article 4(6) precludes a Member State from making the application of that ground for refusal subject to the possession of a permanent residence permit. However, it found that the principle of non discrimination does not preclude the refusal of executing the EAW against its own nationals, while requiring other EU citizens to have lawfully resided therein for a continuous period of five years.

In *Lopes Da Silva*⁴³, the CJEU was asked as to the compatibility of the French law implementing the EAW FD with the principle of non-discrimination. In particular, the national legal regime automatically excluded non-French nationals from the scope of Article 4(6). As a preliminary point, the AG referred to Article 1(3) EAW FD, where it is stated that the FD ‘shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles’ as enshrined in European Union law’. Then, he opined that protecting dignity of the sentenced person should be the ‘overriding concern’ of Member States (when implementing/applying EU law) and the CJEU (when fulfilling its interpretative task)⁴⁴. In this sense, Article 4(6) clearly conveys the need to reach a balance between the smooth functioning of mutual recognition and the achievement of detainees’ rehabilitation. The French law ran counter that objective, as was based on the assumption that only nationals of that state can have the connection required by Article 4(6). That argument could not be accepted for three main reasons: it was contradicted by the same wording of the FD; derogations from the

⁴³ Case C-42/11, *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, 5 September 2012, para 49.

⁴⁴ *Lopes Da Silva*, AG’s Opinion, para 28.

principle of non-discrimination may be allowed where they comply with the principle of proportionality, which was not the case in *Lopes Da Silva*; freedom of movement and residence defies ‘the presumption that a sentenced person has the best chance of reintegrating into society only in the State of which he is a national’⁴⁵. The Court recognised the function underlying Article 4(6), and found that Member States must exercise their discretion consistently with the duty to respect fundamental rights laid down in the FD⁴⁶. Furthermore, Member States cannot exclude a non-national from the scope of Article 4(6), without allowing an individual assessment. A further improvement in the Court’s approach is given by *I. B.*⁴⁷, which revolved around the interpretation of Article 5(1)⁴⁸ and (3). Those provisions respectively allowed to make the surrender conditional to: the possibility to apply for a retrial, where the EAW was based on a judgment delivered *in absentia*; the condition that the surrendered is returned to the executing state, when s/he is a national or resident of the latter. The EAW had been issued under Article 5(1), but *I. B.* was also a resident of the executing Member State. Therefore, the question arose as to what paragraph was applicable in that case. In order to solve the dilemma, the AG stated that the FD must be applied by balancing *the streamlining of judicial cooperation with the protection of fundamental rights*. The latter indeed was regarded as a precondition giving ‘legitimacy to the existence and development of the [AFJS]’⁴⁹. In particular, at stake there was the objective of ‘enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires’⁵⁰. In the absence of an explicit say from the wording of the provision, an interpretation should be given so as not to conflict with the FD’s aims just described. The CJEU espoused the AG’s Opinion. Firstly it recognised that both Articles 4(6) and 5(3) have the function of increasing the chances for the person concerned to be reintegrated into the society. In this respect, nothing in the FD indicates that persons convicted *in absentia* – so falling under the scope of Article 5(1) - should be excluded from that objective. Nor the guarantee that the surrender is made conditional upon the possibility of a retrial can affect in any way the pursuit of that function. Quite the contrary, that guarantee would permit the case to be retried, so rendering that surrender a surrender for the purposes of criminal prosecution, which is the situation envisaged by Article 5(3).

3.1.2 Potential interactions

⁴⁵ *Ibidem*, para 51.

⁴⁶ *Lopes Da Silva*, Court’s judgment, para 34.

⁴⁷ Case C- 306/09, *I.B.*, ECR [2010] I-10341.

⁴⁸ Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24, 27.3.2009. Article 5(1) has been deleted and substituted by the legal framework provided for in FD 2009/299/JHA.

⁴⁹ *I. B.*, AG’s Opinion, para 43.

⁵⁰ *Kozłowski*, para 45, and *Wolzenburg*, para 62.

To examine the potential interactions between EU criminal law and EU citizenship, one has to consider specific instruments related to detention adopted by the EU: the Framework Decisions on post-conviction supervision measures, on recognition of probation orders and alternative (non-custodial) sanctions, on custodial sentences⁵¹. These instruments give rise to some considerations, as to their potential impact on EU citizenship. For instance, the FD on custodial sentences foresees, in certain cases, the transfer of prisoners from a Member State to another without requiring the consent of the sentenced person. The transfer may take place, *inter alia*, when the executing State is where the sentenced person lives. Such potential obligation is grounded in the presumption that the social rehabilitation will better take place in the executing State⁵². The system built on by the FD may attach to imprisonment drawbacks deemed too severe. Once the consent of the prisoner has been removed, the occurrence of a circumstance provided for in the FD would suffice to force the person out of the Member State where he/she is staying. In this respect, such a measure has been seen as resembling an expulsion from the Member State, but divested of the guarantees of the Directive 2004/38/EC⁵³.

Admittedly, the FD allows for a compulsory transfer, e.g. to the Member State where the prisoner *lives*. There seems to be required a rather strong link with the State in question. It then might be difficult if, for instance, the person concerned has already acquired the right of residence in the host Member State, at the moment he/she is imprisoned therein. Nonetheless, the risk may be that the FD lends itself to abuses. First and foremost, it is not clear which is the meaning of ‘living’: whether it may be equated with ‘residing’ or not, and what follows from either cases. Articles 27 and 28 of the Citizenship Directive authorise expulsion of an EU citizen (namely, forcibly moving him/her from the host Member State) only when: an individual assessment has been carried out; the expulsion decision has been adopted on grounds of public policy, public security or public health. These two circumstances are always required, also when no right of residence has been reached by the EU citizen. Furthermore, pursuant to the Directive, previous criminal convictions per se may never constitute grounds for taking expulsion measures. In this context, the FD makes no helpful references to Directive 2004/38/EC, save where the preamble states that the FD should be applied in accordance with the Citizenship Directive⁵⁴. Which may be the consequences of such a statement remains unclear, since one may object that the transfer of a EU citizen from a host Member State might run counter the requirements laid down in the Citizenship Directive.

⁵¹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention OJ L294/20, 11.11.2009; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions OJ L337/102, 16.12.2008; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union OJ L327/27, 5 December 2008.

⁵² Framework Decision 2008/909/JHA, Article 6(2).

⁵³ See on these aspects V. Mitsilegas, *The third wave of third pillar*, in *European Law Review*, (2009) 34, pp. 541 onwards.

⁵⁴ Framework Decision 2008/909/JHA, recital 16.

Turning to the FD on probations decisions, it slightly increases the involvement of the detainee. The FD provides that the recognition of a probation measure is carried out as long as: the sentenced person has returned or wants to return to the State in which he/she is ‘lawfully and ordinarily residing’; the individual has opted for another Member State, with the latter having allowed for the execution⁵⁵. Also in this case, the residence is put in the limelight. The concept at issue seems to fulfil a pivotal role, within the framework of the FD. The instrument discussed might significantly contribute to the social reintegration of the convicted person, with the latter being allowed to serve the sentence in the Member State where he/she is mainly linked. This appears even more true on considering that the detainee may express a preference, with regard to the Member State which should recognise the measure. On the other side, doubts arise as to which meaning is to be given to ‘lawful and ordinary residence’. It should be noted that Directive 2004/38/EC is not mentioned at all. The same holds true for any other secondary law instruments. So as things stand at present, there are no legal references capable of clarifying how to interpret the FD. Whether a relation of residence between the prisoner and the Member State in question may be triggered by the sole individual preference. Whether the assessment must be grounded on objective factors, and if so, which such elements should be. One may hold the ‘residence’ as outlined by the CJEU in *Koslowski* or *Wolzenburg*, but no indications are supplied in this respect.

Intermediate conclusions

The (actual and potential) interactions between EU criminal law and EU citizenship reveal the importance of the concepts of residence, integration and reintegration to the research question of this paper. Under Article 4(6) EAW FD, the state undertakes the reintegration of prisoners on the basis of a link other than that of nationality, namely the residence or the staying in of the person concerned. The AG stated that *residence* is a manifold concept, which changes according to the function of the provision in which it is mentioned. The possibility for the person concerned to rely on the concept of staying in is groundbreaking. Residence has become a recurrent element and is referred to in many instruments of EU law. Whereas the ‘staying in’ factor testifies how the role of nationality links is being reshaped even in a nation-based area such as that of individuals’ rehabilitation. This is confirmed by the FDs on transfer of prisoners and on probation measures, where for the purposes of facilitating the reintegration of the detainee, he/she may serve the sentence in the country where they *live/are lawfully and ordinarily residing*. As reintegration logically presupposes integration, the latter is the substantive link required with the state dealing with the rehabilitation. Such an approach based on the verification of the effective relation with the Member State concerned might ensure a higher protection to prisoners, rather than a formal perspective only grounded on the formal link constituted by nationality.

However one may not ignore a number of shadows hanging over this picture. The first aspect regards the uncertainty surrounding the reach of *residence*. On the one hand, the Court in *Kozlowski* did not explicitly embrace the manifold nature of residence proposed by the AG. On the other, there has not been so far the opportunity to clarify the meaning of *lawfully and ordinarily residing* and (mostly) *living*. As the purpose of

⁵⁵ Framework Decision 2008/947/JHA, Article 5.

these provisions is the personal rehabilitation, their interpretation in the sense of *Kozłowski* should naturally follow. However, the Court has not spent words on the relationship between the concept of residence and the aims of the provision in which it is alluded to. This need for clarity is further required by the removal of prisoners' consent as to his/her transfer: more precisely, the detainee has no role to play on his rehabilitation process, where one of the circumstances provided for in the concerned FD takes place.

Moreover, the concrete application of Article 4(6) in *Wolzenburg* represents a step back in EU prisoners protection. In *Kozłowski*, the Court distinguished between *resident* and *staying in*, by implicitly admitting that the provision in question may apply even to whom is not properly a resident in the host Member State. In *Wolzenburg* this commendable approach is forgotten. The irrefutable presumption of integration when it comes to nationality is legitimised. Concerning other EU citizens, the outcome of the judgment is even more paradoxical. Article 4(6) precludes the requirement of a residence permit of indefinite duration, but the principle of non-discrimination allows the condition of having resided for a continuous five-year period in the executing state: which is, however, the term provided for in the Citizenship Directive to acquire the right to permanent residence in the host Member State. This nonetheless, some commentators have welcomed the Court's approach in *Wolzenburg*, as '[t]o overcome the old system built on sovereignty and nationality and to provide for equal treatment based on mutual recognition in a Union-wide area of justice, is a task to be pursued through thorough steps of EU legislation which also provides for the necessary preconditions (i.e. sufficient approximation) [...] Once again we have to remember that mutual recognition which deprives citizens of rights they formerly had (here: the special protection as a national) cannot be boldly decreed by primary law but must be carefully provided for, step by step, by responsible legislation which guarantees a sufficient level of protection to the individual'⁵⁶. In this respect, one should recall that since then two major changes has occurred, with regard to mutual trust, on the one hand, and protection of fundamental rights in relation to the EAW FD, on the other. As to the former, the Court has recognised that the presumption of respect of fundamental rights by all Member State, on which mutual trust and mutual recognition are based, is a refutable one. Concerning the latter, three Directives have been adopted, which approximate fundamental aspects of criminal procedure and also regard the execution of a EAW: namely, the Directives on the rights to interpretation and translation, to information and to access to a lawyer⁵⁷.

Furthermore, *Wolzenburg* can be seen as an exception also in light of the subsequent CJEU's case-law on Articles 4(6) and 5(3). In *Lopes Da Silva*, the compatibility of an automatic exclusion of non-nationals from the scope of application of Article 4(6) was ruled out. Furthermore, the importance of applying and interpreting the EAW in compliance with fundamental rights was referred to. *I. B.* was issued in the wake of the same

⁵⁶ M. Möstl, *Preconditions and Limits of Mutual Recognition*, in (2010) 47 *Common Market Law Review*, Issue 2, p. 422.

⁵⁷ Directive 2010/64/EU of the European Parliament and of the of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 280/1, 26.10.2010; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1, 6.11.2013.

spirit. However, there is a passage in the AG's Opinion in *Kozłowski* which should not be underestimated. I am referring to the fact that the commission of a crime in the host Member State does not automatically preclude the application of Article 4(6), and more in general the pursuit of the reintegrative function, *unless* the person has been subject to an expulsion measure.

This leads the discussion to the second scenario, where national criminal law and EU citizenship meet. As stated above, the two scenarios are inextricably linked in a circular relationship. On theory, a person could benefit from Article 4(6) and accede to the chance of reintegration after s/he has demonstrated a certain grade of connection with the host Member State. In this respect, the inevitable question arises as to when crime and imprisonment can affect that connection. The response(s) draw the scope of application of Article 4(6) (and of many citizenship rights), so that a careful assessment is needed. This is even more true when considering that, according to the AG, the presence of an expulsion measure deprives the person of the possibility to benefit from Article 4(6). Therefore, the focus necessarily shifts to the impact that detention can have on the integration link.

This issue emerges in a broader context, which regards the development of the Court's approach to the meaning of integration, and the factors lying behind it. That being so, I now move on to the second scenario. Before dealing with the rulings specifically related to the topic of this paper, I locate this case-law in the broader trend just referred to. I conclude that the interpretation of the concept of integration is undergoing a significant involution. Criminal law and detention play a significant role in this respect, as they show the current understanding of that concept is rather removed from reality.

3.2.1 Interactions between EU citizenship and national criminal law

The second scenario focuses on the interactions between national criminal law and EU citizenship. However, the CJEU's rulings analysed below are not isolated cases. They are consistent with a wider trend concerning the Court's approach to EU citizenship, which brings to the fore the relationship between duties and rights in EU citizenship. The debate on this topic is not new⁵⁸. However, it has been recently fed by Kochenov's article, in which he contends that no citizenship duties can be identified at EU law level⁵⁹. A more nuanced argument is put forward by those arguing that the existence of duties in EU citizenship would depend on the understanding of limits and conditions. Indeed, more than once those limits and conditions have been expressed as obligations or responsibilities⁶⁰. Such a discussion is of the utmost importance. As I show, the construction of

⁵⁸ See among many J. H. H. Weiler, 'Europa: "Nous coalisons des Etats, nous n'unissons pas des hommes"', in M. Cartabia and A. Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (Il Mulino, 2009); R. Davis, 'Citizenship of the Union . . . Rights for All?' (2002) 27 *European Law Review*, 121

⁵⁹ See, as a latest example, D. Kochenov, *EU Citizenship without Duties*, in *European Law Journal*, Vol. 20, No. 4, July 2014, pp. 482–498. For a reply, see R. Bellamy, *A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights*, in *European Law Journal*, Vol. 21, No. 4, July 2015, pp. 558–565.

⁶⁰ N. Niamh Shuibhne, *Limits rising, duties ascending: The changing legal shape of Union citizenship*, *Common Market Law Review* 52: 889–938, 2015.

duties/obligations/responsibilities in the CJEU's decisions often brings with it reflections on the meaning of individual integration in the host Member State. In that context, the commission of criminal offences and the respect of national criminal laws can have a heavy impact on citizenship rights.

Broadly speaking, over the last years the Court's case-law on the subject matter has seen a shift from the traditional rights-strengthening interpretation of EU citizenship (and in particular of Directive 2004/38) to a more restrictive approach. As highlighted by Niham Shuibhne in a comprehensive and detailed review⁶¹, this development has regarded three main areas: equal treatment and access to social assistance⁶²; permanent residence; protection against expulsion. In particular, in the last two threads the Court has made an interesting use of the integration argument. As stated, the present scenario focuses on the interaction between national criminal law and EU citizenship, and is concerned with the achievement of permanent residence (*Onuekwere*) and protection against the expulsion (*Tsakouridis*, *P. I.* and *M. G.*). However, it is appropriate to place this analysis within the broader context of the development in the Court's case-law on the topic.

The starting point in the Court's view is that the achievement of citizenship right comes with integration, with the latter resting not only on quantitative and territorial factors, but also on qualitative elements. Therefore, one must evaluate the degree of integration of the person concerned in the host Member State. For instance, *Dias* concerned a person who had been granted a residence permit in compliance with the EC legislation at the time. After that, the personal conditions of the holder made him fall outside the qualifications for the issue of such a permit (she was voluntarily unemployed and not self-sufficient). The Court found applicable Article 16(4), according to which permanent residence can be lost only through absence from the host Member State for a period exceeding two consecutive years. The CJEU stated that even though Article 16(4) 'refers only to absence *from* the host Member State, the integration link between the person concerned and that Member State is also called into question in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence [...] As the situations are comparable, it follows that the rule laid down in Article 16(4) [...] must also be applied by analogy to periods in the host Member State completed on the basis solely of a residence permit [...] without the conditions governing entitlement to a right of residence [...] having been satisfied'⁶³. Two main conclusions can be drawn from these statements. Firstly, according to the Luxembourg Court the residence permit has a declaratory value, rather than constitutive of rights. Secondly, defining the *qualitative* elements of integration can be highly controversial. The *quality* of integration seems capable of determining the legality of residence. This is key since both *the meaning of legal residence* and *the right to residence* underlie many provisions of EU law, capable of seriously affecting the person concerned. A question arises in this respect: on what (legal?) conditions is residence *good enough*, for the purposes of acquiring EU citizenship rights?

⁶¹ *Idibem*, pp. 900 onwards.

⁶² See in particular C-333/13 of 11 November 2014, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, nyp.

⁶³ Case C-325/09, *Dias*, ECR [2011] I-06387, paras 63–65.

In a way, the *Ziolkowski and Szeja* case provides an answer. Therein, the Court was asked as to whether periods of residence spent in the host Member State without fulfilling the conditions of Article 7 (having sufficient resources) can be considered as ‘legal’. The CJEU found that ‘[i]t follows that the concept of legal residence implied by the terms *have resided legally* in Article 16(1) [...] should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1)’⁶⁴. Such a statement should not be underestimated, since it links the legality of residence to the fulfillment of obligations which are not immediately inferable from the relevant law. This is the case either or not the interpreted rules belong to the Citizenship Directive. One can see it in *Alarape and Tijani*, where the possible achievement of permanent residence for children educated in the host Member State was at stake. Indeed, Regulation 492/2011/EU⁶⁵ authorises the residence of migrant workers’ children who are in education. They are exempted from the requirement of having sufficient resources, as provided for in Article 7 of the Citizenship Directive. However, the Court denied that their residence can trigger a right to permanent residence, as they do not meet the conditions of Article 7⁶⁶.

An exception to this trend can be found in a number of judgments regarding the application of Decision No 1/80⁶⁷. The latter provides Turkish workers and their family members with employment rights within the EU, depending on the duration of their time spent in legal employment or the legal residence in the host Member State⁶⁸. Such rights may be limited on grounds of public policy, public security or public health. As the Decision is silent as to the impact that deprivation of liberty could have on these provisions, the Court was asked to rule on this issue in the *Nazli, Dogan, Aydinly* and *Cetinkaya*⁶⁹ cases. Two main features are to be pointed out. Firstly, the persons concerned had already acquired the rights at stake under the Decision. Secondly, in two cases the applicants were subject to expulsion, since the nature of the offence committed, the duration of

⁶⁴ Joined cases C-424/10 and C-425/10, *Tomasz Ziolkowski and Barbara Szeja and Others v Land Berlin*, ECR [2011] I-14035, para 46.

⁶⁵ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L141/1, 27.5.2011.

⁶⁶ Case of 8 May 2013, C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v Secretary of State for the Home Department*. Strikingly, the AG found that the qualitative integration lying behind the right to permanent residence is measured ‘*exclusively* in the light of the condition of financial autonomy’ (para 80).

⁶⁷ Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, signed by Member States of the (then) EEC and the Community and the Republic of Turkey, set up with the Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1; ‘the Association Agreement’).

⁶⁸ Such rights include: responding to any offer of employment after they have been legally resident for at least three years in that Member State; enjoyment of free access to any paid employment of their choice provided they have been legally resident there for at least five years.

⁶⁹ Case C-340/97, *Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg* [2000] ECR I-00957; Case C-138/13 of 10 July 2014, *Naime Dogan v Bundesrepublik Deutschland*, not yet published; Case C-C-373/03, *Ceyhun Aydinli v Land Baden-Württemberg* [2005] I-06181; Case C-467/02, *Inan Cetinkaya v Land Baden-Württemberg* [2004] ECR I-10895.

the custodial sentence, or a combination of both, triggered such coercive measure under the national law in question.

The Court found that, for being effective, the employment rights must be accompanied by a concomitant right to residence which does not depend on the continuing existence of the conditions for access to those rights⁷⁰. Secondly, in none of these cases imprisonment was regarded as automatically amounting to a prolonged absence from the host Member State. The Court affirmed that, though detention prevents the person concerned from working even for a long period, this temporary inactivity/absence does not preclude at all his subsequent return to working life⁷¹. This is even more true when the sentence is suspended in full, with the view to reintegrating the person into society⁷², or most part of the conviction is substituted with drug therapy and suspended⁷³.

These judgments are particularly interesting when compared to a recent CJEU case-law concerning the impact of crime and detention on EU citizenship rights, and especially that of staying in the host Member State those conducts notwithstanding. Indeed, the case-law I am going to discuss seems to be delivered in the wake of the ‘restrictive’ development described first. In the decisions referred above, the Court found that compliance with Article 7 is a precondition of application of Article 16, even though such connection is not clearly established in the Citizenship Directive. When dealing with the interactions between national criminal law and EU citizenship, the Court made no references to positive law in order to solve the cases. Rather, it answered the questions posed by means of a teleological interpretation, with the obedience to national criminal law reflecting the degree of integration into the host society. However, I submit that the Court’s approach is removed from reality, as it establishes an automatism between the commission of (any) criminal offences and the lack of integration of the person concerned in the host Member State.

3.2.2 *The cases*

Tsakouridis

*Tsakouridis*⁷⁴ is a Greek national who had an unlimited residence permit in Germany. After being away from the latter state for 16 months, he was arrested, transferred to Germany and sentenced to imprisonment for drugs offences. According to the Regional Administration, the conviction deprived him of the right of entry and residence in Germany, the reason why he was delivered an expulsion order on imperative grounds of public security.

⁷⁰ *Aydinly*, para 25; *Cetinkaya*, para 31; *Dogan*, para 31; *Nazli*, para 28. See also Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461, paras 29 and 31; Case C-237/91 *Kus v Landeshauptstadt Wiesbaden* [1992] ECR I-6781, para 33, and Case C-171/95, [1997] ECR I-00329, *Recep Tetik v Land Berlin*, paras 26, 30 and 31.

⁷¹ *Dogan*, Court’s judgment, para 22.

⁷² *Nazli*, Court’s judgment, paras 41-42; paras 45-48.

⁷³ *Cetinkaya*, Court’s judgment, para 39; *Aydinli*, Court’s judgment, para 28.

⁷⁴ Case C-145/09 *Tsakouridis* [2010] I-11979.

The AG's Opinion shows the importance of concepts such as integration and reintegration. On the one hand, the Citizenship Directive provides that the longer the residence, the higher the level of integration is presumed to be and the more comprehensive will be the protection afforded against expulsion. On the other, reintegration is key to evaluating the proportionality of a removal measure following a criminal conviction. Expulsion should comply not only with Directive 2004/38/EC, but also with the reintegrative function of penalties, which represents a general principle of EU law (and of all modern legal systems) and is inextricably linked to the concept of human dignity⁷⁵. According to the AG, the competent national authority must state in what respect the expulsion decision does not prejudice the rehabilitation function of the sanction.

In this regards, a balance must be reached between the relevance to the society of the criminal conducts (looking at the classification of/the level of involvement in the offence, the nature of the sanction imposed) and the personal circumstances of the individual concerned (taking into consideration family and working links, the degree of reintegration or the risk of re-offending in light of his/her conduct after the conviction). In this case, the personal behavior was deemed as breaking the link with the host Member State, so causing the loss of the right to enhanced protection⁷⁶. The Court strictly followed the AG's reasoning, and concluded that the fight against dealing in narcotics as part of an organised group *may be* or *is* included in the *imperative grounds of public security*, depending of whether the national judge decided to apply Article 28(2) or Article 28(3) respectively⁷⁷. This conclusion was also corroborated by referring to the importance that the fights against drug trafficking has to the EU, as shown by secondary law⁷⁸.

P. I.

The same reference to EU law⁷⁹ in order to legitimate its findings was made by the Court in *P. I.*⁸⁰, which regarded an Italian national who was granted several residence permits in Germany since 1987. In 2006 he

⁷⁵ Other than the EPR, the AG made reference to the ECtHR case-law according to which '[o]ne of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time, the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment. From that perspective it acknowledges the merit of measures – such as temporary release – permitting the social reintegration of prisoners' (ECtHR judgment of 24 October 2002, *Mastromatteo v. Italy*, App. No 37703/97, para 72).

⁷⁶ *Tsakouridis*, AG's Opinion, paras 50 and 131.

⁷⁷ *Tsakouridis*, Court's judgment, para 56.

⁷⁸ The Court made reference in particular to Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335/8, 11.11.2004.

⁷⁹ In particular, Article 83(1) of the TFEU and Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of the children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335/1, 17.12.2011.

⁸⁰ Case C-348/09 *P.I.* [2012] nyp. See V. Mitsilegas, *EU Criminal Competence after Lisbon: From Securities to Functional Criminalisation*, in Acosta Arcarazo and Murphy, *EU Security and Justice Law*, p. 115; L. Azoulai and S. Coutts, *Restricting Union citizens' residence rights on ground of public policy. Where Union citizenship and AFSJ meet: P.I.*, in *Common Market Law Review*, 50, 2013, pp. 553-570; D. Kochenov and B. Pirker, *Deporting the Citizens Within the European Union*, *op. cit.*

was sentenced to a term of imprisonment of seven years and six months for sexual assault, sexual coercion and rape of a minor. On 6 May 2008, the national authorities determined that Mr. I. had lost the right to enter and reside in Germany, and that he should have been expelled from Germany. The CJEU was asked as to whether the *imperative grounds of public security* contained in Article 28(3) of the Directive cover only threats posed to the internal and external security of the State. The AG argued that the concept of public security includes only crimes which transcend the individual harm caused to the victim(s). Secondly, a strong EU citizenship also implies the development of common means of preventing and combating delinquency. Therefore, the EU as an area of freedom security and justice cannot be constructed on the basis of merely returning any severely punished offender to the Member State of origin, solely on grounds of the penalty imposed⁸¹.

On the other side, the AG found that the integration of a Union citizen is based on territorial, time and *qualitative* factors. As ‘Mr I.’s conduct shows a total lack of desire to integrate into the society in which he finds himself and some of whose fundamental values he so conscientiously disregarded for years’, he cannot rely on the right to enhanced protection against expulsion where that right would derive from criminal conduct constituting a serious disturbance of the public policy of the host Member State. Astonishingly, the Court interpreted the *imperative grounds of public security* also as referring to particularly serious threats to one of the fundamental interests of society, so leaving the national judge free to consider whether this was the case.

Onuekwere and *M. G.*

*Onuekwere*⁸² and *M. G.* may be seen as follow-ups of such an approach. *Onuekwere* concerned a Nigerian national with who was conferred upon a five-year residence permit in the UK in 2000. Between that year and 2008, he was sentenced to imprisonment three times, and after the last release applied for a permanent residence permit. The CJEU was firstly asked as to whether imprisonment time may be included in the five-year period required for the right to permanent residence in the host Member State. Should such a timeframe not be considered, the Court was then called upon to decide whether the periods of detention interrupt the continuity of the five-year period of residence provided in Article 16 of the Directive.

The AG regarded the integration into the host Member State as a requirement, with the residence representing a test for assessing the rate of integration of the individual in the Member State. Criminal conducts show that the person has no desire to integrate into the society of the host Member State, for his behavior disregards societal values as expressed in national criminal law. As a result, the AG suggested that imprisonment cannot be qualified as *legal residence* and may not be taken into account in the calculation of the period of five years⁸³. Furthermore, he found that no discretion should be left to the national judge in this respect, as the European

⁸¹ *P. I.*, AG’s Opinion, paras 38-46.

⁸² Case C-378/12 of 16 January 2014, *Onuekwere v. Secretary of State for Home Department*. See S. Coutts, *Union citizenship as probationary citizenship: Onuekwere*, in *Common Market Law Review*, 52, 2015, pp. 531–546.

⁸³ *Onuekwere*, AG’s Opinion, paras 46-57.

Union legislature is to establish to what extent imprisonment may count for the purposes of Article 16 of Directive⁸⁴.

In the wake of the AG's Opinion, the CJEU rebuffed that the time spent in prison can have any value for the purpose of the meaning of *legal residence*. The Court found that EU citizenship regards the integration as a precondition of the acquisition of the right of permanent residence, based on territorial, temporal and qualitative elements. On that ground, the CJEU answered that the time spent in detention may not be included in the period of five years referred to in the Directive. A prison sentence ensues from a violation, by the person concerned, of Member States' criminal law, which in turn enshrines the societal values of that State. Thus, such a conviction would be a denial of genuine integration, and allowing for the permanent residence in spite of that circumstance would run counter to the aim of the Directive. Furthermore, the CJEU held that detention interrupts the continuity of residence⁸⁵, for a criminal conduct would deny the integration requirement.

*M. G.*⁸⁶ concerned a Portuguese national who entered the United Kingdom with her Portuguese husband on 12 April 1998 and in 2009 she was sentenced to months of imprisonment on one count of cruelty and three counts of assault against her sons. In 2010 she was delivered a deportation order on grounds of public policy and public security. According to the decision, Ms. G. was not entitled to enhanced protection against expulsion, the latter depending on the integration of the Union citizen in the host Member States; such integration could not have taken place, while a period of imprisonment had occurred.

The First-tier Tribunal allowed the appeal made by Ms. G, which decision was challenged by the Secretary of State before the referring court, which decided to stay the proceedings and to ask the following questions to the Court of Justice: when does the calculation of the ten-year period under Article 28(3)(a) start? Must that period be continuous? If so, does imprisonment interrupt such continuity, even when the person concerned has resided in the host Member State for 10 years prior to the imprisonment?

The provision involved in the case was Article 28(3) of the Directive. As said above, such a provision legitimates the expulsion of Union citizens or his/her family members who have resided in the host Member State for 10 years prior to the expulsion only if there are imperative grounds of public security. The Court interpreted the rule as requiring that a Union citizen resided in the host Member State for the 10 years preceding the expulsion decision, on the one hand; on the other, that such period must, in principle, be continuous⁸⁷. Against that backdrop, periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection and, in principle, interrupt the continuity of the period of residence for the purposes of that provision⁸⁸.

⁸⁴ *Ibidem*, para 72.

⁸⁵ *Onuekwere*, Court's judgment, paras 24-32.

⁸⁶ Case C-400/12 of 16 January 2014, *M.G. v. Secretary of State for the Home Department*, nyp.

⁸⁷ *M. G.* judgment, para 28.

⁸⁸ *Ibidem*, para 33.

According to the Court, the system of protection against expulsion measures, like the right to permanent residence, is based on the degree of integration of the persons concerned in the host Member State⁸⁹. The CJEU cited *Onuekwere*, and stated that a person sentenced to imprisonment, by violating Member State's criminal law, has disregarded the societal values of that Member State⁹⁰. However, the fact that the person concerned has resided in the host Member State during the 10 years prior to imprisonment may be taken into consideration as part of the overall assessment for determining whether the enhanced protection will be granted⁹¹.

Intermediate conclusions

The case-law just presented is highly controversial. Also in this cases the relevance of integration and reintegration emerges, with regard to the relationship between detention and EU citizenship. In *Tsakouridis* the AG states that the expulsion of a EU citizen from the host Member State must not jeopardize the reintegrative function of criminal sanctions. This is especially the case when the person concerned has lived therein for a so long time that he has acquired the rights provided for in the Citizenship Directive. Such an integration-based approach was reaffirmed by the AG in *P. I.* The need for a shared fight against delinquency within the EU also implies that Member States develop a common undertaking of rehabilitation of wrongdoers, and not only of their own nationals. However both the AG and the Court concluded in a way which is in sharp contrast with those promising premises. To this end, crime and imprisonment put in the limelight how far EU citizens are from an effective integration: they are integrated, but deprivation of liberty breaks that link (*Tsakouridis*); they might have been integrated due to the time passed, but this has occurred only for their crimes had not been detected yet (*P. I.*); they are not integrated that time spent in the host Member State notwithstanding, as a part of it was passed in prison (*Onuekwere* and *M. G.*). Furthermore, in *Tsakouridis* the AG made reference to the need for the expulsion to be consistent with the rehabilitative function of imprisonment. However, the expulsion often is not a penalty but an administrative measure stemming from the loss of the right to stay in a country due to a criminal conviction. Moreover, the removal usually is carried out when the sentence has been served, at a moment when the reintegrative function should have been taken place (at least on theory). This attention to reintegration is commendable, but it can be misleading.

Therefore, EU nationals may see their Union citizenship rights subject to a Damocles' sword, perfectly embodied by imprisonment. Demonstrating the establishment of an integration link with the host society is a precondition for such rights to be acquired and maintained. To rule on the impact of detention on personal integration is to rule on the entitlement of that person to important rights. This case-law is further disturbing as both the AG and the Court, when evaluating such impact, posed every crime on the same level without differentiation. Furthermore, it is difficult to reconcile with the mentioned judgments on Turkish workers, where the Court highlighted that EU law precludes an automatism between imprisonment and forfeiture of

⁸⁹ *Ibidem*, para 30.

⁹⁰ *Ibidem*, para 31.

⁹¹ *Ibidem*, paras 34-37.

rights already acquired. A person which has spent also several years in prison is not *only on that basis* precluded from reintegrating into the society. Otherwise, the same Court stated, it would sharply contrast with a fundamental function of criminal penalties. The two groups of rulings differ in the rights at stake: employment rights in one case, right to permanent residence (also as a right not to be expelled) in the other. Could this variance per se justify such difference of treatment? It would be preposterous, to say the least. This inconsistency has a detrimental effect on individuals, and this approach to EU prisoners seems to show a preoccupying involution.

4. Conclusions

In this paper I attempted to show what role prison and prisoners can have in EU law. This implied an analysis not only of the impact of EU citizenship law on detention, but also of the condition of detainees in EU citizenship (and *as* EU citizens).

My submission is that dealing with detention-related issues (in particular the execution of the sentence) may no longer be based on formal criteria of nationality, but also and mostly looking upon substantive elements of connection with the Member State in question. Article 4(6) EAW FD, as well as the FDs on the transfer of prisoners and on probation measures seem to weaken such nationality-based approach. The EAW FD refers to ‘staying in’, besides residence. However, other preoccupying circumstances may undermine the innovative nature of such framework. The removal of the consent when it comes to transfer a prisoner on given conditions -though for declared reintegration purposes- seems to look at the prisoner as a mere object of mutual recognition in the hands of Member States. The Court’s interpretation of Article 4(6) EAW FD in *Wolzenburg* is detrimental to Member States’ national and other EU citizens. Article 16 Citizenship Directive (five years of residence in the host Member States) is capable of defining the scope of Article 4(6). This appear to be incongruous, as the latter applies to persons ‘staying in’ other than residents in the host Member State. The same Court acknowledged the existing difference between such two situations.

In any case, *Wolzenburg* might have been an exceptional departure from the traditional approach of the Court on the subject. This is confirmed by the *Lopes Da Silva* and *I. B.* cases. This nonetheless, one should bear in mind that these rights-strengthening attitude is linked to two elements: the residence and the integration of the person concerned in the host Member State. This implies an assessment of the impact of crime and detention on those elements.

Concerns can be voiced with regard to the Court’s interpretation in this respect. While cases such as *Tsakouridis* and *P. I.* show that the integration link is always on trial, in *Onuekwere* and *M. G.* such a link is denied since prison is not a place where becoming integrated. Such a statement raises two main problems. Firstly, there seems to be an irrefutable presumption that every custodial sentence implies non-integration: all crimes are on the same foot. Secondly, as custodial sentences pursue a *reintegration* objective, one should take into consideration what such sentences also to serve *integration* purposes. After all, the outcome should not be so different: namely, allowing the person concerned at the end of his/her punishment to respectfully live together

with the rest of society. Such a conclusion would not automatically lead to the paradoxical result that the longer a person has passed in prison, the more integrated he/she must be considered. Indeed, there should always be an individual assessment of personal conduct also during imprisonment. In conclusion, one could see that the role of prison and prisoners is still incomplete. The importance of nationality seems to be fading, with a growing weight of reintegration purposed in an individual-oriented perspective. However, the consistency of this perspective requires a reconsideration of the current relationship between detention and integration, so allowing detainees the enjoyment of EU citizenship to a greater extent.